

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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August Term, 2012

(Argued: February 1, 2013

Decided: March 1, 2013)

Docket No. 12-1040-ag

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CITY WIDE TRANSIT, INC.,

*Petitioner-Appellee,*

-v.-

COMMISSIONER OF INTERNAL REVENUE,

*Respondent-Appellant.*

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Before:

WALKER, CABRANES, WESLEY, *Circuit Judges.*

The Commissioner of Internal Revenue appeals from an order of the United States Tax Court (Vasquez, J.) that prevented the Commissioner from collecting City Wide Transit, Inc.'s outstanding employment taxes for seven taxable quarters dating as far back as 1997 and as recently as 2000. The tax court held that the Commissioner was time barred from collecting these taxes under § 6501(a) of the Internal Revenue Code and that the tolling provisions under §§ 6501(c)(1) and (2) of the I.R.C. did not apply. We disagree and hold that an accountant who filed fraudulent tax returns on behalf of a company in order to embezzle money otherwise owed to the Commissioner intentionally evaded taxes, thereby triggering the tolling provision under § 6501(c)(1). Accordingly, the Commissioner was free to assess City Wide's taxes for those seven quarters at any

1 time. For the reasons stated below, the order of the tax  
2 court is **REVERSED**.

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7 Kathryn Keneally, Assistant Attorney General,  
8 Washington, D.C.

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12 Gallanty, P.C., New York, NY.

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16 WESLEY, *Circuit Judge*:

17 Some have suggested that the Commissioner of Internal  
18 Revenue ("Commissioner") rarely loses in tax court, tax  
19 court decisions are rarely appealed, and federal circuit  
20 courts rarely reverse tax court decisions. See, e.g., James  
21 Edward Maule, *Instant Replay, Weak Teams, and Disputed*  
22 *Calls: An Empirical Study of Alleged Tax Court Judge Bias*,  
23 66 Tenn. L. Rev. 351, 353, 401 (1999) (reviewing empirical  
24 studies). Despite some of these expectations, after losing  
25 in tax court, the Commissioner appealed, and we now reverse.

26 This case requires us to determine whether an  
27 accountant that filed fraudulent tax returns on behalf of a  
28 company in order to embezzle money that the company  
29 otherwise owed the Commissioner intentionally evaded that  
30 company's taxes within the meaning of § 6501(c)(1) of the

1 Internal Revenue Code ("I.R.C."). Similarly, we must also  
2 determine whether that accountant triggered that tolling  
3 provision when he fraudulently amended tax returns that the  
4 company had already filed.

## 5 I. BACKGROUND

### 6 A. The Fraudulently Filed Tax Returns

7 Ms. Ray Fouche ("Fouche") owned several bus companies,  
8 including Petitioner-Appellee City Wide Transit, Inc. ("City  
9 Wide"). City Wide transported handicapped children  
10 throughout New York City. By the end of 1998, Fouche's bus  
11 companies, including City Wide, collectively accrued about  
12 \$700,000.00 in outstanding payroll tax liabilities unrelated  
13 to this appeal.

14 To negotiate a reduction of these liabilities, Fouche  
15 hired Manzoor Beg, who falsely held himself out as a  
16 certified public accountant, and gave him a blank power of  
17 attorney. On behalf of City Wide, Fouche paid Beg  
18 \$30,000.00 in April 1999 and promised him 25% of the amount  
19 he successfully saved City Wide as result of his  
20 negotiations. Fouche also hired a third-party payroll  
21 service, Brand's Paycheck, Inc. ("Brand's"), to prepare the  
22 Employer's Quarterly Federal Tax Return on Forms 941 for the

1 tax quarters relevant to this appeal: June 1997; December  
2 1998; March 31, June 30, and December 31, 1999; and March 31  
3 and June 30, 2000. For each of those last five quarters,  
4 Fouche drafted checks payable to the IRS sufficient to cover  
5 City Wide's liabilities and gave them, along with the  
6 corresponding returns that Brand's prepared, to Beg, who in  
7 turn promised to deliver them to the revenue officer with  
8 whom he was negotiating.<sup>1</sup>

9 Instead of filing the correct returns, however, Beg  
10 prepared, signed, and filed another set of returns on Forms  
11 941 for those five quarters (collectively, the "Beg  
12 returns"). In those returns, Beg fraudulently added advance  
13 earned income credit ("EIC") payments that significantly  
14 reduced City Wide's tax liabilities. Beg then altered the  
15 checks that City Wide drafted by changing the payee from the  
16 IRS to an account that he maintained at Habib American Bank  
17 in the name of Himalayan Hanoi Craft, deposited or cashed  
18 those checks for his own personal use, and drafted new  
19 checks to cover City Wide's now fraudulently reduced tax  
20 liabilities.

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<sup>1</sup>City Wide had already filed Forms 941 that Brand's prepared for June 1997 and December 1998.

Moreover, Beg also prepared, signed, and filed amended Forms 941 for the June 1997 and December 1998 quarters (the "Beg amendments") in order to add fraudulent EIC payments to the returns that City Wide previously filed. Beg did not personally benefit from these amendments but presumably filed them in an effort to conceal the fraudulent EIC payments he included in the returns that he drafted. Through this scheme, Beg embezzled hundreds of thousands of dollars from City Wide, and City Wide received certain tax refunds. The following table represents the actual reduction in City Wide's taxes resulting from the Beg amendments and returns.

<u>Tax Quarter Ending</u> [Month/Year]	<u>Fraudulent EIC Reductions</u>
June 1997	\$42,211.00
December 1998	\$48,812.00
March 1999	\$40,539.00
June 1999	\$45,388.41
December 1999	\$85,927.41
March 2000	\$53,081.77
June 2000	\$55,655.84
Total	\$371,615.43

1     B.   The United States Prosecutes Beg

2           On June 10, 2002, after discovering Beg's scheme, the  
3     United States filed a complaint in United States District  
4     Court. That complaint alleged, *inter alia*, that Beg (1)  
5     knowingly and willfully prepared false Employer's Quarterly  
6     Federal Tax Returns for City Wide in violation of 26 U.S.C.  
7     § 7206(1); (2) knowingly and intentionally made and  
8     possessed forged checks drawn on City Wide's account in  
9     violation of 18 U.S.C. § 513(a); and (3) knowingly and  
10    intentionally deposited money derived from those forged  
11    checks into his Himalayan bank account in violation of 18  
12    U.S.C. § 1957(a) and (b)(1). On October 8, 2002, Beg waived  
13    indictment and, *inter alia*, pled guilty to preparing false  
14    tax returns for City Wide. Between 2003 and 2005, the  
15    district court commenced certain sentencing proceedings,  
16    until April 7, 2006 when the district court dismissed the  
17    case because Beg had died.

18    C.   The Commissioner Examines City Wide's Returns

19           In May 2004, based on Beg's guilty plea, the  
20    Commissioner began a civil examination of City Wide's  
21    returns to recover the taxes that had been underassessed as  
22    a result of Beg's fraud. Subsequently, the Commissioner  
23    assessed the following:

<u>Taxable Period</u>	<u>Assessment Date</u>	<u>Additional Tax</u> <u>Owed</u>
June 1997	February 26, 2007	\$42,211.00
December 1998	March 12, 2007	\$48,812.00
March 1999	February 26, 2007	\$40,539.00
June 1999	February 26, 2007	\$45,388.41
December 1999	February 26, 2007	\$85,927.41
March 2000	February 26, 2007	\$53,081.77
June 2000	February 26, 2007	\$55,665.84

The Commissioner did not assess any fraud penalties against Fouche or City Wide.

City Wide challenged these assessments as time barred because they were outside of the three-year statute of limitations contemplated by § 6501(a) of the I.R.C. The Commissioner then sent City Wide a Letter 1058, titled Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing, on January 2, 2008. On January 15, 2008, City Wide requested a collection due process ("CDP") hearing again asserting that the assessments were outside of the limitations period. The settlement officer assigned to the CDP hearing conducted a face-to-face hearing with City Wide on May 27, 2008. After exchanging several letters, City Wide requested a Notice of Determination in order to pursue

1 the case in tax court. On December 11, 2008, the  
2 Commissioner issued a Notice of Determination that upheld  
3 the assessments.

4 D. The Tax Court Rules in Favor of City Wide

5 After the Notice of Determination was issued, City Wide  
6 litigated the assessment in tax court maintaining that the  
7 three-year statute of limitations barred the Commissioner  
8 from the relevant assessments and that the I.R.C.'s tolling  
9 provisions were inapplicable. The tax court noted that the  
10 Commissioner could trigger the tolling provisions under  
11 I.R.C. § 6501(c)(1), (2), or both by showing with "clear and  
12 convincing evidence that Mr. Beg had the specific intent to  
13 evade taxes known to be owing by conduct intended to  
14 conceal, mislead, or otherwise prevent the collection of  
15 taxes." *City Wide Transit, Inc. v. Comm'r*, 102 T.C.M. (CCH)  
16 542, 2011 WL 5884981, at \*5 (2011). The tax court  
17 concluded, however, that the Commissioner did not meet that  
18 standard.

19 Although the Commissioner "point[ed] to a number of  
20 egregious acts Mr. Beg performed" that caused the  
21 Commissioner to fail to collect the full amount of City  
22 Wide's taxes, the tax court thought those actions did not  
23 prove that Beg filed fraudulent returns "intend[ing] to



1 defeat or evade [City Wide's] taxes" and that tax evasion  
2 was only the "incidental consequence or secondary effect of  
3 [Beg's] embezzlement scheme." *Id.* at \*6. The tax court  
4 noted City Wide's argument that Beg "intended only to cover  
5 up his embezzlement scheme and not defeat or evade [City  
6 Wide]'s taxes" and that the Commissioner could not "point to  
7 anything in the record that [caused it] to believe [that]  
8 argument [was] meritless." *Id.* Accordingly, the tax court  
9 concluded that the Commissioner was time barred from  
10 assessing the additional taxes and entered judgment for City  
11 Wide.

12 The Commissioner now appeals that decision.

## 13 **II. DISCUSSION**

14 We review the decisions of a tax court "in the same  
15 manner and to the same extent as decisions of the district  
16 courts in civil actions tried without a jury." 26 U.S.C. §  
17 7482(a)(1). Accordingly, we "review the legal rulings of  
18 the [t]ax [c]ourt *de novo* and its factual determinations for  
19 clear error." *Scheidelman v. Comm'r*, 682 F.3d 189, 193 (2d  
20 Cir. 2012). In so doing, we "owe no deference to the [t]ax  
21 [c]ourt's statutory interpretations, its relationship to us  
22 being that of a district court to a court of appeals, not

1 that of an administrative agency to a court of appeals."  
2 *Madison Recycling Assocs. v. Comm'r*, 295 F.3d 280, 285-86  
3 (2d Cir. 2002) (internal quotation marks and citation  
4 omitted). We treat taxpayer intent as a question of fact  
5 subject to clear error review. *See Redd v. N.Y. Div. of*  
6 *Parole*, 678 F.3d 166, 178 (2d Cir. 2012) ("Issues of  
7 causation, intent, and motivation are questions of fact.").  
8 We will, therefore, reverse a tax court's decision regarding  
9 taxpayer intent only if "on the entire evidence[, we are]  
10 left with the definite and firm conviction that a mistake  
11 has been committed." *United States v. Alcan Aluminum Corp.*,  
12 315 F.3d 179, 186 (2d Cir. 2003).

13 A. The Statute of Limitations and Its Exceptions

14 The I.R.C. requires that the Commissioner assess any  
15 tax imposed "within 3 years after the return was filed."  
16 I.R.C. § 6501(a). The I.R.C., however, contains certain  
17 exceptions that make the limitations period limitless. In  
18 relevant portion the I.R.C. provides:

19 (1) False return. In the case of a false or  
20 fraudulent return with the intent to evade tax,  
21 the tax may be assessed, . . . at any time.

22 I.R.C. § 6501(c)(1).<sup>2</sup>

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<sup>2</sup> The Commissioner also relies on I.R.C. § 6501(c)(2), which lifts the statute of limitations "[i]n case of a willful attempt in any manner to defeat or evade tax imposed by this title." The

1        "The burden of proving that a false or fraudulent  
2        return was filed with intent to evade tax is on the  
3        Commissioner . . . and such proof must be made by clear and  
4        convincing evidence." *Schaffer v. Comm'r*, 779 F.2d 849, 857  
5        (2d Cir. 1985)(citing I.R.C. § 7454(a)). However, "[b]ecause  
6        tax evaders do not reveal their fraudulent evasion, the  
7        Commissioner may establish fraud through circumstantial  
8        evidence." *Pittman v. Comm'r*, 100 F.3d 1308, 1319 (7th Cir.  
9        1996). To prove intentional evasion of tax, "the  
10       Commissioner must establish that (1) an underpayment exists;  
11       and (2) some portion of the underpayment was due to fraud."  
12       *Loren-Maltese v. Comm'r*, 104 T.C.M. (CCH) 115, 2012 WL  
13       3079052, at \*1 (2012).

14       In analyzing § 6501(c)(1), we remain mindful that  
15       "limitations statutes barring the collection of taxes  
16       otherwise due and unpaid are strictly construed in favor of  
17       the [Commissioner]." *Bufferd v. Comm'r*, 506 U.S. 523, 527  
18       n.6 (1993) (internal quotation marks and citations omitted).

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tax court has previously stated that "it is difficult to  
articulate a meaningful distinction between 'false or fraudulent  
return with the intent to evade tax' and 'willful attempt in any  
manner to defeat or evade tax.'" *Carl v. Comm'r*, 41 T.C.M. (CCH)  
1346, 1981 WL 10527, at n.16 (1981). Although there may be a  
distinction between § 6501(c)(1) and § 6501(c)(2) in some cases,  
we would, for the reasons set out in this Opinion, reach the same  
conclusion under either provision here. We therefore refer only  
to § 6501(c)(1).

1 "Accordingly, taking [that obligation] into account, we  
2 conclude that the limitations period for assessing [the  
3 taxpayer's] taxes is extended if the taxes were understated  
4 due to fraud of the preparer." *Browning v. Comm'r*, 102  
5 T.C.M. (CCH) 460, 2011 WL 5289636, at \*13 n.14 (2011)  
6 (quoting *Allen v. Comm'r*, 128 T.C. 37, 40, 2007 WL 654357,  
7 at \*40 (2007)). This makes intuitive sense because "the  
8 special disadvantage to the Commissioner in investigating  
9 fraudulent returns is present if the income tax return  
10 preparer committed the fraud that caused the taxes on the  
11 return to be understated." *Allen*, 2007 WL 654357, at \*40.

12 B. The Tax Court Clearly Erred

13 Here, the Commissioner concedes that City Wide's  
14 additional taxes were assessed outside the three-year  
15 limitations period. Moreover, City Wide concedes that Beg  
16 filed false or fraudulent tax returns and amendments on its  
17 behalf and that City Wide's returns trigger the tolling  
18 provision if we find that Beg filed them with the intent to  
19 evade City Wide's taxes.<sup>3</sup> We are confronted, then, with a

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<sup>3</sup>In front of the tax court, City Wide argued that it was not liable for the returns Beg prepared where "(1) [City Wide] did not know of the preparer's defalcations; [and] (2) [City Wide] did not sign or knowingly allow to be filed a false return . . . ." Joint App'x 360; see also *id.* at 350-57 (developing the argument and citing cases). The Commissioner anticipated these claims on appeal and rebutted them in its opening brief. City

1 very narrow question: whether, considering all of the  
2 evidence, the tax court made a mistake by concluding that  
3 the Commissioner failed to establish by clear and convincing  
4 evidence that Beg intended to evade City Wide's taxes  
5 through his embezzlement scheme. Beg's scheme clearly does,  
6 and the tax court made a mistake.

7 Beg drafted and filed five fraudulent returns and two  
8 fraudulent amendments to evade tax. By concluding that the  
9 Commissioner failed to prove that Beg intended to evade City  
10 Wide's taxes and that, at best, tax evasion was but an  
11 "incidental," "secondary effect" to Beg's embezzlement  
12 scheme, the tax court inappropriately substituted motive for  
13 intent. The statute is agnostic as to the attendant  
14 motivations for submitting a fraudulent return and only  
15 requires that the Commissioner prove a fraudulent return was  
16 filed with an intent to evade, that is avoid, paying a tax  
17 otherwise due. Thus, "if one of [a conspiracy's]  
18 objectives, even a minor one, be the evasion of federal  
19 taxes, the offense is made out, though the primary objective

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Wide, however, conceded these issues in its response brief. City Wide Br. at 16. Moreover, each member of this panel asked City Wide whether it had intended this concession, and City Wide responded affirmatively to each of us in turn. Accordingly, we accept this concession without deciding whether certain factual situations might arise that sever the taxpayer's liability from the tax-preparer's wrongdoing.

1 may be concealment of another crime." *Ingram v. United*  
2 *States*, 360 U.S. 672, 679-80 (1959). Moreover, "if a 'tax  
3 evasion motive plays any part' in certain conduct, an  
4 'affirmative willful attempt' to evade taxes may be inferred  
5 from that conduct." *United States v. Klausner*, 80 F.3d 55,  
6 63 (2d Cir. 1996) (quoting *Spies v. United States*, 317 U.S.  
7 492, 499 (1943)). The Commissioner only had to prove that  
8 Beg intended to underpay the Commissioner taxes that City  
9 Wide owed when he filed a fraudulent return on City Wide's  
10 behalf, not that he intended to avoid City Wide's taxes for  
11 City Wide's benefit.

12 Moreover, tax evasion was not an incidental or  
13 secondary effect to Beg's scheme. The tax court's analysis  
14 suggests that Beg's tax evasion was an externality, as if  
15 shortchanging the Commissioner did not figure into Beg's  
16 decision-making calculus. To the contrary, Beg's scheme  
17 was tax evasion; tax evasion was not a subordinate element  
18 to a more grandiose scheme. It is of no consequence that  
19 Beg evaded City Wide's taxes for his own benefit, and the  
20 tax court should have allowed the Commissioner to assess the  
21 taxes that City Wide owed because of Beg's returns and  
22 amendments.

1           In defense of the tax court's decision, City Wide  
2 maintains that the Commissioner's position requires us to  
3 read the intent element out of § 6501(c)(1). In developing  
4 that argument, City Wide claims that reversing the tax court  
5 would require us to assume *ipse dixit* that Beg must have  
6 intended to avoid City Wide's taxes based on the fraudulent  
7 returns alone. City Wide's argument is misplaced, and this  
8 case requires no assumption on our part. Beg filed returns  
9 intending to avoid paying the Commissioner money that was  
10 otherwise due; Beg's calculated scheme to embezzle that  
11 money proves that the returns were fraudulent.

12           This would be another case if, for example, Beg falsely  
13 recorded certain personal expenses as corporate expenses on  
14 City Wide's ledger that in turn caused City Wide to file a  
15 tax return that fraudulently understated its income. If  
16 that had been the case, Beg's fraud on the company would  
17 have *caused* the company to file a false return, and we would  
18 not assume that the company intended to evade a tax by  
19 filing that false return. Here, however, Beg's actions were  
20 not as secondary or remote to the fraudulent returns as the  
21 tax court suggested; Beg was not a third party unrelated to  
22 the preparation and filing of the returns. See I.R.S. Chief  
23 Counsel Advisory 201238026, 2012 WL 4261126 (June 2012).

1 Accordingly, the Commissioner proved "(1) that . . .  
2 underpayment[s] exist[ed] and (2) that fraud exist[ed],  
3 i.e., that [Beg] intended to evade taxes known to be owing  
4 by conduct intended to conceal, mislead, or otherwise  
5 prevent the collection of taxes." *Browning*, 2011 WL 5289636,  
6 at \*10.

7 We note briefly that Beg's motivation for fraudulently  
8 amending the June 1997 and December 1998 returns that City  
9 Wide had previously filed is unclear. He presumably did so  
10 in order to cover up the false EICs he included on the five  
11 returns that he drafted and filed in the first instance.  
12 But again, Beg's motivations are inconsequential, and it is  
13 clear that he filed the two amended returns intending to  
14 evade tax for the foregoing reasons.

15 Accordingly, the Commissioner presented clear and  
16 convincing evidence that Beg intended to evade City Wide's  
17 taxes for the seven taxable quarters in question, thereby  
18 triggering the tolling provision under § 6501(c)(1). The  
19 tax court made a mistake, and we reverse.



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The tax court's order of November 23, 2011 precluding the Commissioner for assessing City Wide's taxes for the seven relevant quarters is hereby **REVERSED**. The Commissioner is free to assess the taxes for the seven relevant quarters at any time.